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No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1946

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of James E. Markham, Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 29–40) is reported at 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 52–63) is reported at 156 F. 2d 653.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on May 22,

1945 (R. 63–64). A petition for amendment of the opinion was denied by an order entered on July 17, 1946 (R. 64). On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for certiorari until October 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 259 of the California Probate Code, as amended, is invalid as an invasion of the federal field of control over foreign affairs.

2. Whether Article IV of the Treaty of 1923 with Germany was abrogated by the declaration of war with Germany or otherwise rendered inoperative, from that time, by the provisions of the Trading with the Enemy Act, as amended.

3. Whether Article IV of the Treaty overrides the California statute.

4. Whether Section 259 of the California Probate Code, as amended, if valid, imposes the burden of proof of the nonexistence of reciprocal inheritance rights upon those who invoke the Section to establish interests in an estate.

TREATY AND STATUTES INVOLVED

The pertinent portions of the treaty and statutes involved are set out in the Appendix, pp. 21–23.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 2, 7). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942, in the Superior Court of the City and County of San Francisco (R. 3, 6–7). By this will, she bequeathed her entire estate, composed of real and personal property in San Francisco (R. 20–23), to four heirs-at-law, all residents and nationals of Germany (R. 3, 6, 8, 10–11). On December 30, 1942, six other heirs-at-law, residents of California, filed in the probate proceeding a petition for determination of heirship (R. 3, 7–9, 18), claiming that under Chapter 895 of California Statutes, 1941, the German legatees were ineligible as beneficiaries and that the California heirs should therefore inherit. There has never been a hearing on this petition.

Chapter 895 added to the California Probate Code a provision (Section 259) which conditioned the rights of aliens not residing in the United States to inherit property in California on the existence of reciprocal inheritance rights in American citizens in the country of which the alien is a resident, and upon the rights of American citizens to receive payment within the United States of moneys originating from estates of persons dying in such foreign country. Section 259.1, also enacted in 1941, placed upon the nonresident alien heirs the burden of establishing the existence of such reciprocal rights.

On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762, by which he vested in himself all right, title, and interest of the German legatees in the estate of Alvina Wagner, and specifically in the real property included in the estate (R. 10–15, 20–23). The Custodian thereafter instituted this action in the District Court of the United States for the Northern District of California against the executor and the six California heirs-at-law (R. 2–5). He sought a judgment determining, *inter alia,* that the California heirs have no interest in the estate and that the Custodian is entitled to the entire net estate after payment of expenses of administration, taxes, and debts, if any (R. 4–5).

The District Court granted the Custodian's motion for judgment on the pleadings (R. 27), holding that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 34), and that the California statute is invalid as an invasion of "the field of foreign relations, a domain reserved exclusively to the Federal government" and as an interference with the field of control of enemy property, fully occupied by the Trading with the Enemy Act, as amended (R. 37–38, 41). The court therefore decreed (R. 41–42) that the devises and legacies to the German heirs are valid, that upon the death of the testatrix her estate passed to the German heirs, subject to administration, and that by virtue of the Vesting Order the

Custodian acquired all the right, title, and interest of the German heirs in the estate.

The heirs appealed to the Circuit Court of Appeals for the Ninth Circuit which, without passing upon the merits of the Custodian's claim, reversed the judgment upon the ground that the district court was without jurisdiction of the subject matter of the action. *Allen* v. *Markham,* 147 F. 2d 136. On writ of certiorari, this Court reversed the judgment and remanded the case for disposition on the merits (R. 50–51). *Markham* v. *Allen,* 326 U. S. 490. The Circuit Court of Appeals again reversed the judgment of the District Court, holding that the California statute is constitutional as an exercise of the power of the State to regulate the succession to property (R. 57–58); that because the provisions of Article IV of the Treaty of 1923 with Germany (*infra,* p. 21) are irreconcilable with the Trading with the Enemy Act, the treaty provision became inoperative at the time of the declaration of the war; that such was the intention of the parties to the treaty; and that, moreover, Congress abrogated Article IV by enacting the First War Powers Act, 1941, which amended Section 5 (b) of the Trading with the Enemy Act (*infra,* p. 23) (R. 59–62).

During the time the case was pending in this Court the California statute was amended by California Statutes, 1945, Chapter 1160. Section

259.1 was repealed and Section 259 (*infra*, p. 22) was modified. The Circuit Court of Appeals held that the amended statute imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian (R. 62–63).

REASONS FOR GRANTING THE WRIT

1. *The issues are of national importance.*—The issues of federal law raised by this case are important for their bearing upon the exclusive control of foreign affairs by the Federal Government and upon the effect of the Trading with the Enemy Act, as amended, on existing treaties. In upholding the validity of the California statute, the Court below has condoned an interference by a State in the field of foreign affairs. The court has, moreover, held that the reciprocal inheritance provisions of our treaty of 1923 with Germany did not survive the war. This decision is inconsistent with the view of the Department of State (see letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945, Appendix, pp. 24–31), and until the question is decided by this Court the Government will be embarrassed in taking a position on the binding effect of the treaty. The court's conclusion that Congress intended, by the enactment of the First War Powers Act, 1941, to abrogate the treaty unsettles the law with respect to the abrogation of treaties by subsequent legislation. It rests on meager evidence which, if viewed as the court suggests, would also cast doubt upon the present effectiveness of other treaties.

Identical issues are involved in some 250 other estates in California in which the Custodian has issued vesting orders. Reciprocal inheritance statutes similar to the California statute here involved exist in five other states[1] and have been invoked in Montana, Nevada and Oregon to defeat vesting orders.

2. *The decision below is erroneous.*—a. The United States has concluded some seventy treaties containing a provision for reciprocal inheritance rights, of which eighteen were in force in 1940. These treaties are collected in Gibson, *Aliens and the Law* (1940), Appendix B, Table 8, pp. 182–183. Yet the California statute[2] (*infra*, p. 22) is

[1] Arizona, 3 Ariz. Code (1939), Sec. 39–111; Montana, Laws of Mont. (1939), ch. 104; Nevada, 2 Nev. Comp. Laws Supp. 1931–1941, Sec. 9894; Oregon, 5 Oregon Comp. Laws Ann. (1940), Sec. 61–107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167, and 177. See also 2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055.

[2] It is here assumed that the statute as amended in 1945 (*infra*, p. 22) is applicable to this case. See *infra*, p. 20, n. 9. The original statute was even more plainly invalid. As enacted in 1941, the statute conditioned the rights of alien heirs not only on proof of reciprocal inheritance rights of United States citizens in the country of their residence but on the right of United States citizens to receive payment within the United States of moneys originating from estates of persons dying in the country of residence of the alien heir. California Statutes, 1941, Chapter 895. The second condition was clearly invalid as a regulation of foreign commerce. It was, moreover, invalid for the additional reason that it sought to duplicate the federal program for the control of foreign funds. Executive Order No. 8389, April 10, 1940 (5 F. R. 1400), as amended.

in substance an invitation to foreign states to trade inheritance rights abroad for inheritance rights in California. If the foreign state grants American citizens the right to inherit abroad, the California legislature offers in return to grant residents of such states the right to inherit in California. The statute seeks to accomplish the same objective as do the existing reciprocal inheritance rights treaties—the grant by foreign states of the right of American citizens to inherit property abroad. The statute is, therefore, invalid as a duplication of the treaty-making program (*Hines* v. *Davidowitz*, 312 U. S. 52) and as an indirect attempt to negotiate with foreign states for reciprocal inheritance rights. The power of the States severally to negotiate with foreign states never existed before (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–317), and plainly could not exist after, the adoption of the Constitution, which reserved the treaty-making power to the Federal Government and expressly forbade it to the States. *Hauenstein* v. *Lynham*, 100 U. S. 483, 490; 8 Op. A. G. 411, 415–416. *Cf. United States* v. *Rauscher*, 119 U. S. 407, 414; *Holmes* v. *Jennison*, 14 Pet. 540, 572; *People ex rel Barlow* v. *Curtis*, 50 N. Y. 321, 329.

The court below seems to have been of the view that California was not attempting to trade inheritance rights with foreign countries but was rather choosing to act as they did with respect to inheritance rights, and that this was no more than the

exercise of the State's undoubted power to regulate the succession to property (R. 57–58).[3] *Blythe* v. *Hinckley*, 180 U. S. 333, 341–342; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562. California could admittedly deny all aliens the right to inherit. *Terrace* v. *Thompson*, 263 U. S. 197. The defect of this statute, however, is that it conditions that right on the extension of a specified privilege to American citizens by the alien's country. Such a privilege is unrelated to the legitimate benefits to California to be achieved by the exercise of the power over succession to property. The right of American citizens to inherit property abroad is a matter for international negotiation exclusively by the Federal Government and cannot be the objective of state action, or the condition on which a state will permit aliens to inherit.

b. Treaty provisions are no longer regarded as automatically abrogated by the outbreak of war between the signatory powers. In the absence of evidence of the intention of the parties, the test is the compatibility of the continued existence of the treaty clause with the state of hostilities. *Karnuth* v. *United States*, 279 U. S. 231; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 494. See Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946),

[3] Two decisions of intermediate courts in California, now pending in the Supreme Court of California after argument, are in accord. *Estate of Alfred Karl Knutzen*, 70 A. C. A. 856; *Estate of Bevilacqua*, 70 A. C. A. 679, 917.

34 Geo. L. J. 129. There is no inconsistency between a state of war and the inheritance of property by enemy citizens resident in the United States. Although war may make it impossible for nonresident enemies to realize upon their inheritances or to withdraw the proceeds, as provided for in the treaty, the actual acquisition of title by them is also not inconsistent with the state of hostilities, particularly since the Alien Property Custodian can represent the enemy or, as has been done in this case, vest his title and take in his place.

The appellate courts to which this problem was presented following the First World War held that treaty provisions, such as Article IV of the Treaty of December 8, 1923, with Germany (*infra*, p. 21), providing for reciprocal inheritance rights, survived the outbreak of war. The subject is exhaustively dealt with in an opinion by Judge Cardozo for the New York Court of Appeals in *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643, with respect to the reciprocal inheritance clause of the Treaty of May 8, 1848, with Austria (Art. II, 9 Stat. 944, and 945). In *Goos* v. *Brocks*, 117 Neb. 750, and *State, ex rel. Miner* v. *Reardon*, 120 Kan. 614, the Nebraska and Kansas courts held the provisions of the Treaty of May 1, 1828, with Prussia (Art. XIV, 8 Stat. 378, 384) to be effective after the declaration of war on Germany. The treaty provisions involved in these three cases are substan-

tially identical with Article IV of the 1923 treaty with Germany.

The Department of State, whose opinion on such a question is entitled to great weight (*Sullivan* v. *Kidd*, 254 U. S. 433, 442), has concluded that "there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war." (Letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945, Appendix, pp. 21, 27.)

Despite these authorities, the court below held that Article IV became inoperative on the declaration of war because of the provisions of the Trading with the Enemy Act. The first ground stated (R. 59–60) is that the rights granted by Article IV of the treaty are irreconcilable with those provisions of the Act which forbid the entry into this country of nonresident enemy heirs or their communicating with persons in the United States and which prevent the withdrawal of the proceeds of inheritances. The Act, however, is only incidentally related to inheritance and is not addressed to that problem. The restrictions on foreign heirs contained in the Act or the executive orders issued under it would largely have resulted from the state of war itself. Since the forbidden acts may be licensed (Sec. 3, 40 Stat. 412, 50 U. S. C. App. 3; Sec. 5 (b), as amended, *infra*, p. 23), there is no necessary inconsistency between the Act and the treaty. In any event, a treaty will not be deemed to have

been abrogated by a later statute unless an intention to abrogate has been clearly manifested by Congress. *Cook* v. *United States,* 288 U. S. 102, 120; *Chew Heong* v. *United States,* 112 U. S. 536. There is no manifestation of such an intention in this case.

The court below found such a congressional intention in the terms of the First War Powers Act, 1941, which amended Section 5 (b) of the Trading with the Enemy Act. As amended, Section 5 (b) authorizes the vesting of "any property or interest of any foreign country or national thereof" and the use of such property "in the interest of and for the benefit of the United States" (*infra,* p. 23). The court held that this grant of authority subjected inherited property to confiscation and thus "Congress by ignoring the Treaty effectively provided for breaking or suspending or abrogating the reciprocal inheritance provision of the Treaty" (R. 62). While it is correct to state that Congress ignored the reciprocal inheritance provisions of the treaty in passing the Act and the amendments thereto,[4]

[4] The legislative history of the Trading with the Enemy Act and its amendments gives no indication that Congress adverted to a possible relationship between the legislation and treaty provisions for reciprocal inheritance rights.

We have found no reference to the question of treaty obligations in the legislative history of the First War Powers Act, 1941, which extended the vesting power to foreign nationals.

The legislative history of the original Trading with the Enemy Act and its amendments is most voluminous. In

the proper conclusion is that Congress has thereby not shown an intention to abrogate the treaty provision. Section 5 (b) applies not only to the property of enemies but to the property of any foreign national. If this wide grant of authority shows an intention to abrogate Article IV of the treaty with Germany, that intention embraces as well the comparable clauses in our existing treaties with Great Britain (Art. I, II, March 2, 1899, 31 Stat. 1939), Norway (Art. IV, June 5, 1928, 47 Stat. 2135, 2138), Brazil (Art. XI, Dec. 12, 1828, 8 Stat. 390, 392), Spain (Art. III, July 3, 1902, 33 Stat. 2105, 2107) and other countries. See Gibson, *Aliens and the Law, supra,* pp. 182–183.

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the course of discussions in the Congress there were many references to Article XXIII of the Treaty of July 11, 1799 with Prussia (as revived by Article XII of the Treaty of May 1, 1828, 8 Stat. 162, 174, 378, 384), which provided that in time of war the contracting parties would permit the merchants of the other party to leave the country with their possessions. *E. g.*, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess. p. 33; 55 Cong. Rec. 4851, 65th Cong., 1st Sess.; 61 Cong. Rec. 2510, 3283, 3298, 67th Cong., 1st Sess.; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13496, 67th Cong., 4th Sess. pp. 40, 155, 181, 227; 69 Cong. Rec. 882, 70th Cong. 1st Sess.; Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154. We have found no mention of the possible effect of the Act on Article XIV of the treaty of 1828, which provides for reciprocal inheritance rights (8 Stat. 378, 384).

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Section 5 (b) merely confers authority to vest property. Not until this authority is exercised can the statute be said to affect the rights of a German national protected by the treaty. And even the vesting of such a German's inheritance need not permanently deprive him of the benefits of it. The property may be applied to the payment of his debts (Sec. 34, added by Sec. 305, First War Powers Act, 1941, as amended by the Act of August 8, 1946, Public Law No. 671, 79th Cong. 2d Sess.) and it is possible that Congress may ultimately decide to return vested property or some part of it to the former owners.[5] Even if it could be said with complete certainty that the vesting order in this case will be followed neither by the return of the property nor its application to the debts of the former owners,

[5] Following the last war the major portion of the property seized under the Act was returned under Congressional direction. The Winslow Act of March 4, 1923 (42 Stat. 1511) provided for return to former owners of seized property up to $10,000. The return of an additional 80% of the property in excess of $10,000 was authorized by the provisions of the Settlement of War Claims Act of 1928 (45 Stat. 254, 270). The remaining 20% was retained by the United States as security for the payment by the German government of the awards of the Mixed Claims Commission.

With respect to property vested during this war Congress has recently granted authority which permits the return of property formerly owned by classes of persons not deemed hostile to the United States, including enemy nationals who have been the victims of political, racial or religious discrimination by the enemy. Sec. 32 (a), added by Public Law No. 322, 79th Cong., 2d Sess., and as amended by Sec. 2, Public Law No. 671, 79th Cong., 2d Sess.

the order cannot be taken retroactively to have undone the effect of the treaty, under which the alien heirs' rights became established at the death of the testatrix.

As a further ground for its decision, the court found in the Treaty of Berlin of 1921, restoring friendly relations with Germany (42 Stat. 1939)* (R. 61–62), an expression of an intent to suspend Article IV in time of war. That treaty ratified the right of the United States, reserved by the Joint Resolution of July 2, 1921, to retain seized German property until "suitable provision for the satisfaction" of war claims against the German Government should be made (42 Stat. 105, 106). The court adduced this provision to show that the parties to the treaty of 1923 believed

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*The court suggested that further evidence of such an intention lies in the inclusion of Article IV in the treaty of 1923, a provision "which would have been unnecessary if such provisions were still in effect under the older treaty" (R. 61). The court is in error in assuming that the older treaty—the treaty of 1828—survived until the treaty of 1923. The treaty of 1828 was terminated through the failure of the United States to give the notice required by the Treaty of Berlin for its revival. *The Sophie Rickmers*, 45 F. 2d 413 (S. D. N. Y.); *Flensburger Dampfercompagnie* v. *United States*, 59 F. 2d 464, 470–471 (Ct. Cl.); letter from Secretary of State Kellogg to Congressman Rainey, October 23, 1926, set out in Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property, 69th Cong., 1st Sess., p. 623. Such terminations by a failure to revive under treaties of peace are, however, inconclusive as to the effectiveness of the treaty during the war. *The Sophie Rickmers*, *supra*, at p. 418.

that reciprocal inheritance provisions do not survive the outbreak of war. At the time of the signing of the treaty of 1923, however, Congress had already passed the Winslow Act, under which at least a partial return was made to most former owners (*supra*, n. 5). The Department of State has advised that although there does not appear to be any evidence of the actual intention of the parties to the 1923 treaty with respect to the present question, "in view of the then recent decision in *Techt* v. *Hughes, supra,* it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war." (Letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945, Appendix, pp. 24, 31.)

c. The court below did not reach the question of the construction of Article IV of the treaty of 1923, but rather assumed (R. 57) that the Article if effective, grants to the German heirs of Alvina Wagner the right to inherit both the realty and personalty in her estate. In this assumption, we believe the court was correct.

There can be little doubt that the first paragraph of Article IV (*infra,* p. 21), relating to realty grants to any German national, who would otherwise be disqualified by state law from inheriting,

the right to have the benefit of his inheritance through a sale and the withdrawal of the proceeds. A great number of courts, construing substantially identical treaty provisions, have so held. *E. g., Hauenstein* v. *Lynham,* 100 U. S. 483, 486–487 (Art. V, Treaty of Nov. 25, 1850 with Switzerland, 11 Stat. 587, 590); *Colson* v. *Carlson,* 116 Kan. 593 (Art. I, Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939); *People* v. *Gerke and Clark,* 5 Cal. 381 (Art. XIV, Treaty of May 1, 1828 with Prussia, 8 Stat. 378, 384); *Schultze* v. *Schultze,* 144 Ill. 290 (Art. VII, Treaty of Dec. 20, 1827 with the Hanseatic Republics, 8 Stat. 366, 370); *Techt* v. *Hughes,* 229 N. Y. 222, certiorari denied, 254 U. S. 643 (Art. II, Treaty of May 8, 1848 with Austria, 9 Stat. 944, 945); *Sullivan* v. *Kidd,* 254 U. S. 433, *passim* (Treaty of March 2, 1899 with Great Britain, *supra*). The only decision to the contrary is one by the California District Court of Appeal, now pending in the Supreme Court of California after argument. *Estate of Alfred Karl Knutzen,* 70 A. C. A. 856. That case, involving Article IV of the treaty of 1923, is substantially identical with the instant one.

With respect to the second paragraph of Article IV of the treaty (*infra,* p. 21), which governs personalty, the argument has been made that it is applicable only if the decedent was an alien. It may be assumed for purposes of argument that

Alvina Wagner was not an alien.[7] We believe, however, that analysis of the cases construing the second paragraph establishes the error of any construction which makes citizenship of the decedent the controlling factor. *Re Stixrud,* 58 Wash. 339 (Art. VI, Treaty of April 3, 1783 with Sweden, as revived, 8 Stat. 60, 64, 232, 240, 346, 354); *Trott* v. *State,* 41 N. D. 614 (Art. II, Treaty of March 2, 1899 with Great Britain, 31 Stat. 1939); *Brown* v. *Peterson,* 185 Ia. 314 (Art. XIV, Treaty of June 1, 1910 with Sweden, 37 Stat. 1479, 1488); *Olsson* v. *Savage,* 119 Kan. 603 (Art. XIV, Treaty of June 1, 1910 with Sweden, *supra*); *Jost* v. *Jost,* 1 Mackey 487 (S. C. D. C.) (Art. V, Treaty of Nov. 25, 1850 with Switzerland, 11 Stat. 587, 590). See *Schultze* v. *Schultze,* 144 Ill. 290 (Art. V, Treaty of Nov. 25, 1850 with Switzerland, *supra*).

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[7] The record does not disclose her citizenship.

[8] In *Petersen* v. *Iowa,* 245 U. S. 170, this Court held that Article VII of the Treaty of April 26, 1826 with Denmark, as renewed (8 Stat. 340, 342, 11 Stat. 719, 720) applied only where the decedent was an alien. That treaty, however, was written in terms of equality of taxation on property and *Petersen* v. *Iowa* is therefore not relevant here. This Court has held similarly in two companion cases to *Petersen* v. *Iowa,* involving the Treaty of April 3, 1783 with Sweden, as revived, *supra,* which is comparable to the instant treaty. *Duus* v. *Brown,* 245 U. S. 176; *Skarderud* v. *Tax Commission,* 245 U. S. 633. The *Duus* case, however, merely affirmed the decision below on the authority of *Petersen* v. *Iowa,* and in *Skarderud* v. *Tax Commission,* the affirmance *per curiam* was rested on *Duus* v. *Brown.* These three cases, moreover, were cases involving the validity of discriminatory inheritance

d. In the event that the California statute is found to be constitutional and not overridden by the treaty, the statute should properly be construed as imposing on the defendant heirs the burden of proof of the nonexistence of reciprocal rights. As enacted in 1941, Section 259.1 provided that "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259" (California Statutes, 1941, Chapter 895). Chapter 1160 of California Statutes, 1945, repealed Section 259.1 and amended Section 259 to provide, in part, as follows (*infra*, pp. 22–23):

> It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution * * * a petition is filed by any person interested in the estate requesting the court to find that * * * such reciprocal rights * * * do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal * * * rights shall be upon the petitioner.

The court below correctly assumed that this amendment, enacted pending the appeal herein,

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taxes on personalty inherited by nonresident next of kin and, therefore, this Court was not presented with the question now raised—whether the realty and personalty provision of the treaty involved should be similarly construed, without regard to the citizenship of the ancestor.

is applicable to the case[9] and went on to hold that the burden of proving the existence of such rights is upon the Custodian (R. 63). In so holding, the court failed to follow the terms of the statute. The statute explicitly establishes a presumption that reciprocal rights exist; the burden of proving that such rights do not exist is imposed upon any person interested in the estate who desires to assume such a burden. The Custodian cannot be called upon to prove what is presumed by the statute itself.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

OCTOBER 1946.

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[9] The California rule requires the application of new law existing at the time of decision by an appellate court. *First National Bank* v. *Henderson*, 101 Cal. 307; *Pacific Gas etc. Co.* v. *State of California*, 214 Cal. 369; *Freeman* v. *Glenn County Telephone Co.*, 184 Cal. 508. See *People* v. *Bank of San Luis Obispo*, 159 Cal. 65, 79–80. In this respect, the California courts have adopted the federal rule, as expressed in *United States* v. *The Schooner Peggy*, 1 Cranch 103, and recently approved by this Court. *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538; *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23.

APPENDIX

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal

property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of

all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b), provides in pertinent part as follows:

> (1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

Letter of the Acting Secretary of State to the Attorney General, dated May 21, 1945:

In reply refer to
Le 740.00113 EW
/4–1245

DEPARTMENT OF STATE,
Washington, May 21, 1945.

MY DEAR MR. ATTORNEY GENERAL: I refer to your letter of April 12, 1945 transmitting a copy of the appellee's brief in the case of *Allen et al.* v. *Markham, Alien Property Custodian,* pending before the United States Circuit Court of Appeals for the Ninth Circuit, in which you state that the Department of Justice is contending that the provisions of Articles I and IV of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed December 8, 1923, "have not been abrogated by the war, but are still effective". You inquire whether the Department of State concurs in the position which you are advancing on this point. * * *

It appears that the case relates to the inheritance of land in California from a decedent who died June 6, 1942, that the Alien Property Custodian has vested the interests in such land of certain German nationals resident in Germany, and that the Alien Property Custodian and the Department of Justice contend that provisions of Article IV of the Treaty remained in effect despite the outbreak of war and therefore entitled the German heirs to inherit the interest which has been vested by the Alien Property Custodian.

Article I of the Treaty covers a broad field, conferring upon nationals of each

High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.

It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled. As the Supreme Court stated in *Karnuth* v. *United States ex rel. Albro,* 279 U. S. 231, 236 (1929):

"The effect of war upon treaties is a subject in respect of which there are widely divergent opinions * * *. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making * * *".

Speaking through Judge Cardozo, the New York Court of Appeals said in *Techt* v. *Hughes,* 229 N. Y. 222, 240; 128 N. E. 185, 191 (1920, certiorari denied, 254 U. S. 643):

"The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came * * *. The writers of our own time reject these sweeping statements * * *. International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes

standards, but it does not fetter itself with rules".

After enumeration of various types of treaty provisions, Judge Cardozo added that the "principle or standard" is "that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected". Judge Cardozo then pointed out the difference between the effect of war in giving the belligerent government the privilege of terminating the treaty provisions, and termination *ipso facto* by the outbreak of war. He reiterated that the function of the courts was "to determine whether, alone or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act" (128 N. E. 185, 192).

In *Karnuth* v. *United States ex rel. Albro, supra,* the Supreme Court appears to have applied a somewhat similar test, in holding that the War of 1812 had terminated the provision of Article III of the Jay Treaty conferring the right "freely to pass and repass" into the territories of the two parties on the American continent. Contrasting this provision with the right to hold lands and dispose thereof accorded under the Treaty of Peace of 1783 and confirmed by Article IX of the Jay Treaty, the court said:

"It is not permanent in its nature. It is wholly promissory and prospective and

necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility" (279 U. S. 231, 239).

In the *Sophie Rickmers*, 45 F. (2d) 413 (S. D. N. Y. 1930), Circuit Judge Julian Mack held that the outbreak of war in 1917 between the United States and Germany did not terminate or suspend the provision of Article II of the Treaty of Commerce and Navigation of 1828 between the United States and Prussia to the effect that Prussian vessels should be entitled to the same treatment as American vessels in matters of tonnage taxes. He quoted with approval Judge Cardozo's language in *Techt* v. *Hughes, supra*, and added:

"The criteria of judgment must then be pragmatic" (p. 419). Distinguishing the factual situation from that in the *Karnuth* case, *supra*, he said: "Taxation or no taxation cannot vitally affect the course of trade, for the taxes imposed are not so large as to be prohibitory. It is difficult to see how reciprocity of tonnage taxation can in any way affect the national safety, the right of entry itself being in no way denied" (p. 421).

Applying the principles of these decisions to Article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, et cetera. On the other hand, there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war.

A provision in a treaty with Austria-Hungary similar to Article IV was held effective during war time in *Techt* v. *Hughes, supra,* in which Judge Cardozo laid down the principle quoted and said:

"I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty, so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it. * * *

"The plaintiff is a resident; but even if she were a nonresident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the Alien Property Custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. c. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations" (128 N. E. 185, 192). Referring to the statements that treaties of commerce were suspended or abrogated by war, he added:

"Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on guard against being misled by labels

* * *. There is a line of division fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations" (*ibid.*, 193).

This case was followed in *State ex rel. Miner* v. *Reardon*, 120 Kans. 614, 245 Pac. 158 (1926), in which the court said with respect to a treaty provision that aliens might inherit:

"if it is to survive a declaration of war it must be upon other grounds; that is, an inference that it is intended to be enforced notwithstanding the parties are at war must be based upon different considerations. Upon the grounds indicated in the opinion in the Techt-Hughes Case we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace" (p. 159). The Supreme Court of Nebraska came to the same conclusion in *Goos* v. *Brocks*, 117 Neb. 750, 223 N. W. 13 (1929); in which the court said of a treaty provision regarding the disposition and inheritance of property:

"* * * the treaty provision involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war." (p. 16)

While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: * * * provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" (279 U. S. 231, 236–237).

Although Secretary of State Lansing wrote on September 10, 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary (1918 For. Rel. Supp. 2, p. 309), that statement was made prior to the judicial decisions discussed herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognizing greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.

It may be observed that the courts of this country appear to have taken a position somewhat more favorable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among the modern writers there appears to be a trend in favor of the view that "the element on which must depend an answer to the question whether or not a particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the in-

tention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself." (Sir Cecil Hurst, "The Effect of War on Treaties," 1921–1922 British Year Book of International Law, 37, 47.) See also C. C. Hyde, *International Law* (2nd ed. 1945) volume II, pp. 1546 *et seq.*; Harvard Research in International Law, *Law of Treaties*, 29 A. J. I. L. Supp. (1935), 1183 *et seq.* There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt* v. *Hughes, supra*, it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.

In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that Article IV of the Treaty of December 8, 1923 with Germany remains in effect despite the outbreak of war.

Sincerly yours,

JOSEPH C. GREW,
Acting Secretary.

The Honorable FRANCIS BIDDLE,
Attorney General

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